

U.S. Supreme Court, D.C.
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No. 84-103

ALEXANDER L. STEVENS,
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

ABBEY NURSING HOME, INC., and MAX A. STRAUSS,
Petitioners,

v.

ESTATE OF ALMA RICHARDSON, VERNEDA BENTLEY,
ADMINISTRATRIX,
Respondent.

On Writ Of Certiorari To The Ohio
Eighth District Court Of Appeals

**RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED FOR REVIEW

Is it a violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (i.e.—a denial of due process) for a state court to submit to a civil jury the issue of punitive damages for which said jury may also consider reasonable attorney fees, and thereby render an award of damages for plaintiff (Respondent) against defendants (Petitioners) where competent evidence proves the grossly negligent manner in which defendants subjected a partially paralyzed woman (i.e.—plaintiff's decedent) to filth and deplorable, unsanitary conditions including sexual abuse, physical abuse, verbal abuse, and a complete disregard for her personal rights, dignity, health and safety?

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**CITATIONS OF OPINIONS AND JUDGMENTS RENDERED
IN THE COURTS BELOW**

- A. Order denying Motion for Rehearing in the Supreme Court, Ohio Supreme Court Case No. 84-264, May 23, 1984. (See Appendix, Exhibit A).
- B. Order and Opinion denying Motion in Support of Jurisdiction in the Supreme Court of Ohio, Ohio Supreme Court Case No. 84-264, April 18, 1984. (See Appendix, Exhibit B).
- C. Order and Opinion affirming trial court judgment, Ohio Court of Appeals, Eighth Appellate District, Case No. 4626. (See Appendix, Exhibit D).

- D. Order rendering judgment upon verdict after Remittitur, Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit E).
- E. Order granting Motion for Remittitur in Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit F).
- F. Order rendering judgment in accordance with jury verdict, in second trial, Cuyahoga County, Ohio Court of Common Pleas, Case No. 988159. (See Appendix, Exhibit G).
- G. Order denying Motion to Certify in Supreme Court of Ohio, Ohio Supreme Court Case No. 81-1453. (See Appendix, Exhibit H).
- H. Order denying Motion to Certify in Supreme Court of Ohio, Ohio Supreme Court Case No. 81-1454. (See Appendix, Exhibit J).
- I. Order denying Motion to Certify, Ohio Court of Appeals, Eighth Appellate District, Case Nos. 42156 and 42168. (See Appendix, Exhibit L).
- J. Order and Opinion remanding original trial court judgment, Ohio Court of Appeals, Eighth Appellate District, Case Nos. 42156 and 42168. (See Appendix, Exhibit M).
- K. Order entering judgment upon verdict at first trial in Cuyahoga County, Ohio Court of Common Pledas, Case No. 988159. (See Appendix, Exhibit N).

JURISDICTIONAL STATEMENT

Petitioners erroneously allege and request this Honorable Court to invoke jurisdiction pursuant to 28 U.S.C. Section 1257 (3), which reads in pertinent part:

By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute, is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.

Respondent contends that the petitioners have failed to present a claim which warrants the invocation or confers upon this Supreme Court, the jurisdictional requisite and right to review and/or grant certiorari. Wherefore, the judgment of the lower court must stand, and petitioners' request for Writ of Certiorari denied.

ALLEGED CONSTITUTIONAL PROVISION INVOLVED

Respondent further contends that the petitioners have failed to present to this Court any facts which constitute violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF THE CASE

This case came to be heard in the Common Pleas Court of Cuyahoga County, Ohio, upon an action instituted by the Administratrix of the Estate of Alma Richardson (Richardson) against, *inter alia*, Abbey Nursing Home, Inc. (Abbey) and Max A. Strauss for negligence in the care and protection that they provided for decedent.

In the first trial, a jury verdict in the amount of Three Thousand One Hundred Eighty-eight Dollars (\$3,188.00)

was returned against said defendants (See Appendix, Ex. N) after three (3) weeks of testimony and evidence introduced at the trial court. Subsequently, both plaintiff and defendants, Abbey and Max A. Strauss, appealed from said judgment, respectively Case Nos. 42156 and 42168. Both appeals resulted from the same lower court trial; consequently, the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District consolidated said appeals, reversed the trial court and remanded the within action for a new trial. (See Appendix, Ex. M). *Inter alia*, said Ohio Court of Appeals held that there was sufficient evidence introduced at trial to render the issue of punitive damages a jury question; and that it was error for the trial court to refuse such an instruction.

In July, 1982, the action was retired before the Honorable George J. McMonagle, in the Court of Common Pleas, Cuyahoga County, Ohio, and on July 22, 1982, the jury rendered a verdict in favor of plaintiff-respondent in the sum of Seventy Five Thousand Dollars (\$75,000.00) in compensatory damages and Three Hundred Thousand Dollars (\$300,000.00) in punitive damages against defendants-petitioners Abbey Nursing Home, Inc., and Max A. Strauss (See Appendix, Ex. G). Subsequently, defendants-petitioners timely filed a Motion for New Trial or, in the alternative, a Motion for Judgment Notwithstanding the Verdict and a Motion for a Remittitur. The trial court found Defendants' Motion for a Remittitur to be well taken and determined that the judgment with respect to punitive damages was excessive by One Hundred Twenty-five Thousand Dollars (\$125,000.00) although not the result of passion and prejudice (See Appendix, Ex. F). Plaintiff consented to the remittitur; consequently, defendants' Motion for New Trial and for Judgment Notwithstanding the Verdict were overruled and judgment was entered in the amount of Seventy-five

Thousand Dollars (\$75,000.00) in compensatory damages and One Hundred Seventy-five Thousand Dollars (\$175,000.00) in punitive damages (See Appendix, Ex. E).

Subsequently, defendants-petitioners appealed from the judgment rendered in the second trial (said appeal was filed with the Eighth Appellate District, Ohio Court of Appeals; and assigned Case No. 46126). In its decision announced December 8, 1983, said Appeals Court affirmed the judgment against defendants, Abbey Nursing Home, Inc., and Max Strauss, in the amount of Seventy-five Thousand Dollars (\$75,000.00) in compensatory damages, and One Hundred Seventy-five Thousand Dollars (\$175,000.00) in punitive damages. (See Appendix, Ex. D).

In January, 1984, the defendants-petitioners then filed a Notice of Appeal to the Supreme Court of Ohio. That action was assigned Ohio Supreme Court Case No. 84-264. In April, 1984, the Ohio Supreme Court denied petitioners' Motion in Support of Jurisdiction (See Appendix, Ex. B). In May, 1984, the Ohio Supreme Court denied petitioners' Motion for Rehearing (See Appendix, Ex. A), and on or about July 17, 1984, the appellants-petitioners caused to be docketed with this Court their Petition for Writ of Certiorari.

In addition to the procedural posture set forth above, several Motions were filed with the Eighth Appellate District Court of Appeals of Ohio, in January, 1984. In its Opinion and Judgment Entry of March 6, 1984, (see Appendix, Ex. C), said Court of Appeals denied appellants' Motion to Certify, denied appellants' Motion for Consideration EN BANC, denied appellee's Motion to tax costs and CLARIFIED the decision and opinion announced December 8, 1983. Whereby, appellants then

filed a Notice of Appeal from the March 6, 1984 decision and Brief in Support of Jurisdiction with the Supreme Court of Ohio, Ohio Supreme Court Case No. 84-711.¹

STATEMENT OF FACTS

On February 3, 1978, Alma Richardson was admitted to Abbey Nursing Home. she was admitted to Abbey Nursing Home directly from University Hospital of Cleveland, where she had been hospitalized. She was transported from University Hospital to Abbey Nursing Home by an ambulance and was carried into Abbey on a stretcher. At the time Alma Richardson was admitted to Abbey Nursing Home, she was sixty-four (64) years old and very obese, weighing well over two hundred (200) pounds. Not only was Alma Richardson suffering from hypertension, but more importantly, she was suffering from the residuals of prior brain surgery and prior strokes which left her paralyzed and completely helpless. Further, she had been diagnosed as having organic heart disease which required regular medication. The results of the strokes and prior brain surgery were that Alma Richardson was a double incontinent and suffered from left hemiplegia or total paralysis of the left side of her body. Evidence at trial, including the admissions by Max Strauss, the owner/operator of Abbey and the original admission records of Abbey indicated that Abbey Nursing Home was aware of these conditions and diagnosed Alma Richardson as needing total care and being completely unable to feed or care for herself. Finally, despite these numerous and severe health problems, the evidence at trial, including the admissions of Max Strauss and the admission records of Abbey Nursing Home, in-

¹ That case is still pending in the Supreme Court of Ohio.

dicated that Alma Richardson's skin was in very good condition with no broken areas or irritations.²

During the stay of Alma Richardson in Abbey Nursing Home, it was extremely over-crowded with patients; there was constant noise, crying and screaming of patients needing aid; there was a lack of professional staff, especially nurses; there was inadequate supervision of the staff on duty, some of whom engaged in sexual acts when they were supposed to be on duty caring for patients; and, the entire nursing home was kept in an unclean and unsanitary condition with the constant stench of urine and feces throughout the home.³ Abbey Nursing Home formulated no coordinated patient-care plan for Alma Richardson; it paid insufficient attention to her dietary needs; and it formulated no physical therapy service plan for Alma Richardson.⁴ The evidence at trial showed that Alma Richardson, who was totally incapable of defending herself in any way, was verbally and physically abused by members of the staff of Abbey Nursing Home and physically and sexually abused by both male and female patients (sodomy and lesbianism). Moreover, she was not fed properly, nor was she kept clean, given regular baths, regular medication or moved regularly.⁵

² Said facts are stated in the July 9, 1981 decision rendered by the Eighth District Court of Appeals; See Appendix, Ex. M. *See also* Exhibit 52, Chart of Alma Richardson while at Abbey Nursing Home, especially admission records and exam.

³ See, Transcript, direct testimony of Sr. Catherine Cassidy pp. 1329 to 1332, 1339, 1388 and 1389 and Appendix, Ex. M.

⁴ See, Exhibit 52, *Ibid* and Appendix, Ex. M.

⁵ See, Exhibit 52, *Ibid* and transcript, direct testimony of Verneda Bentley, pp. 1115 to 1119 and Appendix, Ex. M.

On June 19, 1978, Alma Richardson was withdrawn from Abbey Nursing Home by her daughter and granddaughter. She was transported to University Hospital in an ambulance. The Emergency room records of University Hospital and the testimony of Dr. Donald Bruce Goodfellow, the treating physician in the emergency room indicated that Alma Richardson was treated for one inch by three inch (1" x 3") abrasions on her left posterior thigh, which were approximately four (4) days to one (1) week old. The physician ordered an X-ray to determine if her left shoulder was fractured or broken. Although Alma Richardson's left shoulder was neither broken nor fractured, there was a very large black and blue bruised area on her left biceps (ecchymoma), her shoulder motion was very limited, and she was suffering from soft tissue trauma in this area. Further, she was suffering from a severe rash under her left breast.⁶

The testimony of Verneda Bentley indicated that at the time Alma Richardson was taken to the emergency room, her back and buttocks were also bruised, and there were open cuts on her back. Also, Alma Richardson's face was swollen and puffed as if she had been beaten.⁷ These injuries led to investigation by the University Hospital Social Worker, Walter Drummond, since they could not possibly have been self-inflicted by a paralyzed Alma Richardson. Because of the unusual and suspect injuries, Dr. Goodfellow filled out and signed a complaint form which was forwarded to the Cuyahoga County Welfare Department.⁸ In addition to the aforementioned injuries,

⁶ See, Exhibit 32, University Hospital Emergency Room Report and Appendix, Ex. M.

⁷ See, Transcript, direct testimony of Verneda Bentley, pp. 1131 to 1134, 1148 and Exhibits 18, 19, 20, 21 and 22 and Appendix, Ex. M.

⁸ See, Transcript, direct testimony of Walter Drummond at pp. 654 to 662 and Appendix, Ex. M.

Alma Richardson had a severe rash and open flesh area in the vicinity of her vagina as well as other lacerations, bruises and sores in other parts of her body. She was so filthy, she had to be washed by her granddaughter before the doctor could examine her.

ARGUMENT IN OPPOSITION TO CERTIORARI

The trial court did not err in charging the jury as follows:

Now, if you find for the plaintiff and award actual damage, you may also consider whether you will separately award punitive damages. If you do not find actual damage, you cannot find punitive damage.

Punitive damage is an amount which a [250] *Jury may but is not required to award as a punishment to discourage others from committing similar unlawful acts.* Punitive damage may be awarded only where a party intentionally and with actual malice injured another without lawful justification or excuse. Actual malice means anger, hatred, ill will, hostility toward another, or a spirit of revenge.

Now, actual malice under the law may be inferred from intentional, reckless, wanton, willful or gross acts which cause the injuries to the person of another. *A plaintiff may recover punitive damages for negligence where the negligence is so gross as to show a reckless indifference to the rights and safety of other persons.*

A principal's liability for willful and wanton and malicious acts does not extend to a liability in punitive damages unless the principal or master has authorized, ratified or acquiesced in and participated in an employee's conduct or has failed to exercise due and reasonable care in selecting or retaining such employee.

Now, if you award punitive damages, the [251] amount should be fair and reasonable under all of the facts and circumstances, and should not be excessive, nor actuated by passion or prejudice. The amount of punitive damage rests in the sound judgment of the Jury and should be determined from all of the evidence in the case. If no amount is awarded for punitive damage, write the word "None" in lieu of an amount in the space provided.

If you award punitive damage, you MAY CONSIDER and include in the award for actual damage a reasonable amount for the attorney fees of counsel employed by the Plaintiff in the prosecution of this action. (TR. 2149, 2150, 2151, emphasis added).

The trial court's charge clearly and unequivocally instructs the members of the jury that they have the *option to consider* and award reasonable attorneys fees if punitive damages are actually assessed against defendants. Such language is permissive and in no way whatsoever compelled the jury to actually include or determine a specific amount for attorney fees.

The petitioners illogically and unsuccessfully argue to this Honorable Court that they have been denied due process because no evidence was submitted to the jury regarding the value of reasonable attorney fees. However, petitioners have failed to explain and prove to this Court how they have been prejudiced because the simple fact is that *they have not been prejudiced in any way*. The petitioners' argument *assumes* that the jury was required to determine and award attorney fees. *THIS WAS NOT THE CASE*. The jury was simply instructed that if they decide to award punitive damages they *could consider* attorney fees, if they so desired, in determining compensatory damages. It may very well be that the jury never considered or included attorney fees in their award. *The amount of the award of damages was in the*

sole province of the jury. Similarly, the jury has the sole and exclusive power to determine an amount for pain and suffering in arriving at a sum for damages in a tort action. To follow the petitioners' argument would be to strip the jury of its sole authority to determine and award damages. This has always been the function of the jury in our system of jurisprudence.

In fact, respondent submits that the petitioners *would have been prejudiced* if the trial court had permitted respondent to present evidence as to the value of attorney fees because the jury, after being subjected to hearing such evidence, might have been predisposed or compelled to award punitive damages.

Instead, the trial court properly instructed the jury that if it awarded punitive damages it had the sole discretion to consider reasonable attorney fees as compensatory damages.

In no way were the petitioners prejudiced since the jury was *not required* to specifically award attorney fees. Furthermore, petitioners have failed to explain why it is so "unrealistic or unpersuasive" to assume that a jury can adequately gauge the reasonable value of an attorney's services from their everyday life experiences.

Petitioners have further failed to cite one case which is applicable to the action herein and which would warrant this Court's granting certiorari. Petitioners erroneously contend that the holding in *Swanson v. Swanson*, 48 Ohio App.2d 85, 355 N.E.2d 894 (Cuyahoga County, 1976) compelled the trial court to require plaintiff-respondent to produce evidence as to the reasonable value of attorney fees. In the *Swanson* case, the Court of Appeals held:

[I]n making an award of attorney fees as alimony, consideration must be given to the reasonableness of

the attorney fees and to the special criteria used in granting of an alimony award. (Citation omitted, emphasis added) *Id.*, at 898.

Clearly, the holding in *Swanson* deals specifically with attorney fees as alimony payments and is totally inapplicable to the action herein, which involves the determination of punitive damages.

The controlling Ohio case law since 1859 provides that where ". . . punitive damages are proper," [an] aggrieved party may also recover reasonable attorney fees." *Columbus Finance Inc. v. Howard*, 42 Ohio St.2d 178, 327 N.E.2d 654, 655 (1975). Furthermore, the rule in Ohio, as established by the Supreme Court of Ohio, *precludes* the admission of evidence of attorney fees in cases in which the issue of punitive damages has been submitted to the trier of fact. *Roberts v. Mason*, 10 Ohio St. 277 (1859); *Smithhisler v. Dutter*, 157 Ohio St. 454 (1952); *Peckham Iron Co. v. Harper*, 41 Ohio St. 100 (1884); *Finney v. Smith*, 31 Ohio St. 529 (1877). This has been the law of Ohio since 1859 as promulgated by the Supreme Court of Ohio and affirmed and followed by subsequent Ohio courts in hundreds of cases for the past one hundred twenty-five (125) years. The Supreme Court of Ohio, in the course of exercising its jurisdiction and fulfilling its duty to the citizens of Ohio, has determined that this procedure of precluding evidence of attorney fees when considering punitive damages is the most effective and conservative means to protect all statutory and constitutionally guaranteed rights of all citizens within the State of Ohio.

* Petitioners do not contend that the issue of punitive damages was improperly submitted to the jury; the only issue the petitioners have raised is that evidence of attorney fees was not introduced or admitted at trial.

In the *Mason* case, the Ohio Supreme Court held:

. . . [I]n cases where the act complained of its tainted by fraud, or involves an ingredient of malice, or insult, the jury, which has power to punish, has necessarily the right to include the CONSIDERATION of proper and reasonable counsel fees in their estimate of damages . . .

. . . No evidence in this case appears to have been given to the jury on the subject of counsel fees; nor do we think such evidence ought to have been given or received. But the fact that the plaintiff would necessarily be subjected to expenses of that kind, was properly taken into consideration and allowed, as a circumstance in the case patent before them. *Roberts v. Mason*, Id., at 282 (emphasis added).

At least forty-four (44) states recognize the doctrine of punitive damages; and a VAST majority of those states permit a jury to consider the reasonable and probable expenses of conducting a suit, as well as reasonable attorney fees. Furthermore, when determining punitive damages, many states implement the same procedures and safeguards as those established by the Supreme Court of Ohio; and do not require actual proof of reasonable attorney fees and expense. See *Afro-American Publishing Co. v. Jaffe*, 125 App. DC 70, 366 F.2d 649 (1966); *Titus v. Corkins*, 21 KAN 722 (1879); *Evans v. Central L. Ins. Co.*, 87 KAN 641, 125 P. 86 (1912); *Brewer v. Home-Stake Production Co.*, 200 KAN 96, 434 P.2d 828 (1967); *New Orleans, J. & G. N. R. Co. v. Allbritton*, 38 Miss. 242 (1859); *Sherrick v. Wyland*, 14 TEX CIV. App. 299, 37 S.W.345 (1896).

In *Titus v. Corkins*, Id. at 722, the Kansas Court held that it was immaterial as to whether or not a party has proven actual expenditures or the reasonable value of attorney fees because the jury was aware that the suit was prosecuted involving time, labor and expenses; and that

it is very reasonable to expect members of a jury to be able to consider and access the value of said expenses and fees.

It is clear that each individual state possesses the sole jurisdiction and right to determine: (1) whether or not the issue of punitive damages will be recognized and utilized by the courts of their state; and, (2) the applicable factors, procedures and safeguards to be used when considering, assessing and determining punitive damages. This is *not* an issue of national importance, nor has there been any proof of any abuse of process by the courts of the State of Ohio. Therefore, petitioners' request must be denied.

Assuming arguendo, if the jury had failed to award the proper amount of damages, as determined by the evidence in the case, any resulting prejudicial effect was already remedied at the trial court level when the trial court judge granted the defendants-petitioners' Motion for Remittitur and diminished the award of punitive damages from Three Hundred Thousand Dollars (\$300,000.00) to One Hundred Seventy-five Thousand Dollars (\$175,000.00). Thus, proving that petitioners were given a full and complete trial with all safeguards of due process as protected by the Fourteenth Amendment. Therefore, petitioners' Writ of Certiorari is unwarranted and must not be granted in the case herein.

CONCLUSION

Wherefore, based upon the law and arguments set forth herein, respondent respectfully requests this Court to find petitioners' arguments are not well taken, and, therefore, certiorari must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicholas M. DeVito, Counsel for Respondent, Estate of Alma Richardson, Verneda Bentley, Administratrix, and a member of the Bar of the Supreme Court of the United States, certify that on August ____, 1984, I served three (3) copies of the foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari on Louis H. Orkin, Esq., Attorney for Petitioners, by regular U.S. Mail, First Class, addressed to: Louis H. Orkin, Esq., 24200 Chagrin Blvd., Suite 150, Beachwood, Ohio 44122.

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